No. 05-1447

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IN THE

Supreme Court of the United States

THE CHRISTIAN CIVIC LEAGUE OF MAINE, INC.,
Appellant,

v.

FEDERAL ELECTION COMMISSION,
Appellee,

and

JOHN MCCAIN, RUSSELL FEINGOLD, CHRISTOPHER SHAYS, MARTIN MEEHAN, AND TOM ALLEN,
Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM OF INTERVENOR-APPELLEES SENATOR JOHN MCCAIN, SENATOR RUSS FEINGOLD, REPRESENTATIVE CHRISTOPHER SHAYS, REPRESENTATIVE MARTIN MEEHAN, AND REPRESENTATIVE TOM ALLEN

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QUESTIONS PRESENTED

1. Whether this appeal is moot because the time period for which appellant sought preliminary injunctive relief has expired.

2. Whether the three-judge district court acted within its discretion in denying appellant's motion for a preliminary injunction against enforcement of the federal prohibition on the use of corporate treasury funds to finance "electioneering communications."

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INTRODUCTION

In this appeal, plaintiff Christian Civic League of Maine, Inc., ("CCL") challenges the unanimous decision of a three-judge district court denying its motion for a preliminary injunction. CCL requested the preliminary injunction as part of an as-applied challenge to the electioneering communications provisions of the Federal Election Campaign Act ("FECA" or "Act"), as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"). The underlying suit alleges that the Act is unconstitutional to the extent it prevented CCL from using its general treasury funds to broadcast, within 30 days of Maine's June 13, 2006, Republican primary election, a radio advertisement that referred to a clearly identified candidate in that election and criticized her position on a controversial issue. CCL sought a preliminary injunction permitting it to finance broadcasts of the ad with unrestricted funds from May 14, when the ad became an "electioneering communication" under FECA, until June 5, 2006, the scheduled date of a Senate vote on the federal Marriage Protection Amendment, which CCL's ad purported to address. The district court refused to grant the preliminary injunction, and this Court denied a request to expedite appeal of that decision. On June 7, the Senate considered and defeated the Marriage Protection Amendment. CCL never ran the proposed advertisement, and it has expressly disavowed any concrete plan to do so in the future.

This appeal is now moot. The time period for which CCL requested a preliminary injunction has passed. That injunction cannot turn back the clock, nor can it somehow undo the alleged "irreparable injury" that CCL sought to avoid through emergency relief. Because "[n]o order of this Court could affect the parties' rights with respect to the injunction [it is] called upon to review," *Honig* v. *Students of Cal. Sch. for the Blind*, 471 U.S. 148, 149 (1985) (per curiam), there is no subject matter jurisdiction over this appeal. Nor is there any basis for applying the "capable of repetition, yet evading review" exception to petitioner's request for *preliminary* relief. The issues in this case will not

"evade review" if this interlocutory appeal is dismissed. Those issues (including both the merits and the as-yet unresolved issue of whether the underlying controversy is moot) remain pending before the three-judge court. The district court's final judgment—whether based on the merits or on jurisdictional grounds—will be subject to statutory review in this Court at the appropriate time.

If this Court concludes that this appeal remains live, it Court should summarily affirm the decision below. The district court did not abuse its discretion in concluding that CCL failed to establish any of the requirements for preliminary injunctive relief. CCL has not demonstrated a likelihood of success on the merits, because the advertisement at issue exemplifies the type of communication that Congress has a compelling interest in regulating. CCL cannot show irreparable injury, because it retains ample means of propagating its message consistent with FECA. And CCL cannot establish that the proposed injunction would serve the public interest, which plainly lies in the FEC's ability to enforce an Act of Congress that this Court recently upheld against facial constitutional challenge.

STATEMENT

1. The "electioneering communication" provisions of FECA prohibit corporations and labor unions from using their general treasury funds to pay for any "broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and that is broadcast within either 30 days of a federal primary election or 60 days of a general election in the jurisdiction in which the named candidate is running. 2 U.S.C. §§ 441(b)(2), 434(f)(3); *see also* 11 C.F.R. § 100.29 (defining "electioneering communication"). This Court upheld the constitutionality of those provisions against a facial challenge in *McConnell* v. *Federal Election Commission*, 540 U.S. 93 (2003). Noting its longstanding "respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation," the Court "easily" concluded that compelling governmental interests support the prohibi-

tion on electioneering communications financed with general corporate funds. *Id.* at 205 (internal quotation marks omitted).

This Court reasoned in particular that the same justifications that support regulation of so-called "express advocacy" apply to broadcast advertisements that clearly refer to a candidate in the period before an election. To the extent such advertisements "are intended to influence the voters' decisions and have that effect," the Court explained, they are "the functional equivalent of express advocacy," *id.* at 206: "Little difference exist[s] . . . between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 540 U.S. at 126-127. The Court also rejected as "simply wrong" the argument that the electioneering communications provisions imposed a "complete ban on expression," noting that "corporations can still fund electioneering communications with PAC money." And the Court reasoned that "in the future corporations and unions may finance genuine issue ads during those time frames by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Id.* at 206.

In *Wisconsin Right to Life* v. *FEC, Inc.*, 126 S. Ct. 1016 (2006), this Court clarified that its decision in *McConnell* upholding the electioneering provisions against facial attack "did not purport to resolve future as-applied challenges." *Id.* at 1018. The Court therefore left open the possibility that constitutional issues might arise from application of those provisions to "particular communications." *Id.* at 1017.

2. a. CCL commenced this action on April 3, 2006. According to the complaint, CCL intended to broadcast in early June 2006, a radio advertisement that referred to Senator Olympia Snowe, a candidate in Maine's June 13 Republican primary. The advertisement, entitled "Crossroads," began by warning listeners that "[m]arriage between a man and a woman has been challenged and could be declared unconstitutional at any time by rogue judges." The ad then con-

demned Senator Snowe's position on that issue by stating that she "unfortunately" "voted against the Marriage Protection Amendment two years ago." The ad closed by urging listeners to "call Sens. Snowe and Collins immediately and urge them to support the Marriage Protection Amendment when it comes to a vote in early June." J.S. App. 1a-2a.

The complaint conceded that this advertisement constituted an "electioneering communication" within the meaning of FECA, and therefore that the Act prohibited CCL from using general treasury funds to finance the ad's broadcast within 30 days of the primary election. CCL contended, however, that FECA could not constitutionally restrict the funding of such "grassroots lobbying" communications, which, according to CCL, do not implicate the interests supporting the Act's electioneering communication provisions. The complaint therefore sought a judgment declaring those provisions unconstitutional as applied to the advertisement. CCL also requested, in both its complaint and a separate motion filed the same day, the relief at issue here: a preliminary injunction permitting it to broadcast the "Crossroads" ad to Maine voters until the Senate's June 2006 vote on the Marriage Protection Amendment.[1]

b. The district court permitted extremely abbreviated discovery, lasting approximately one week and including only one deposition, with respect to the request for preliminary relief. The few facts that emerged in that period revealed that CCL's interest in sponsoring the "Crossroads" ad arose only after it was contacted by another group, Focus on the Family. On March 24, 2006, that organization sent to

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[1] In addition, the complaint alleged that CCL intends to run advertisements "materially similar" to the "Crossroads" ad "before future primary and general elections in Maine," Compl., 4, and sought injunctive and declaratory relief with respect to such hypothetical "electioneering communications by CCL that constitute grass-roots lobbying," *id.* at 13. Neither the complaint nor the record contains any indication of the content of any such future ads or the circumstances in which CCL might wish to broadcast them. Those claims are the subject of dispositive motions currently pending before the district court. *See infra*, n.3.

a broad list of groups nationwide an email solitication entitled "Possible legal action needed." Ex. B. to FEC Opp. to Mot. for Prelim. Inj. The email stated that it was sent to certain groups "because [they were] in [states] that could be affected by the McCain-Feingold restrictions on Marriage Amendment lobbying ads that target U.S. senators who are on the ballot." *Id.* Attached to the email was a message from counsel, who offered to seek a federal court injunction at no charge on behalf of "any group" that would "step up" by running a "grass roots lobbying" ad during the electioneering communications period. Counsel further noted that "[t]his may even involve an appeal to the U.S. Supreme Court (which would result in a landmark ruling.)" *Id.* The email directed any recipient "willing to assist us in this matter" to contact counsel directly. *Id.*

Within an hour of receiving that email, CCL's executive director responded to counsel, stating, "I will run an ad in that period of time mentioning Olympia Snowe." Ex. C to FEC Opp. to Mot. for Prelim. Inj. Focus on the Family then sent CCL "hypothetical" information on advertising rates in Maine radio markets and also supplied CCL with the text of the "Crossroads" ad that was attached to the complaint CCL filed several days later in the court below. Heath Dep., Ex. A to FEC Opp. to Mot. for Prelim. Inj., at 46, 51, 59; Ex. D.

On April 13, 2006—ten days after this suit commenced—CCL executive director Michael Heath testified that CCL lacked the approximately $4,000 it estimated would be required to broadcast the "Crossroads" advertisement, had done nothing to record or produce it, had not contacted a single radio station about buying time to broadcast the ad, and did not know where or how often the ad would run. Heath Dep., Ex. A to FEC Opp. to Mot. for Prelim. Inj., at 46, 51-52, 54, 59, 65-68, 70, 73-74. Eight days later, CCL filed a supplemental declaration of Mr. Heath stating that CCL had located a single donor willing to contribute approximately $3,900 to finance the ad's broadcast. Heath Decl., Ex. A to Pl.'s Reply in Supp. of Mot. for Prelim. Inj., at 5.

3. Following expedited briefing, the three-judge district court unanimously denied CCL's motion for a preliminary injunction. In an opinion issued on May 9, 2006, the court held that CCL failed to meet the standard for obtaining such relief.

The court first concluded that CCL had not demonstrated a substantial likelihood of success on the merits. J.S. App. 8a. The panel observed that, "[p]articularly after *McConnell*, there can be no question that the governmental interest in maintaining the integrity of the electoral process is compelling." *Id.* The court then reasoned that FECA is "narrowly tailored" to serve that interest "with respect to the League proposal to pay for the broadcast of its advertisement from its corporate funds." *Id.* at 9a.

That was so, the court explained, for two primary reasons. First, the Act afforded CCL ample means to propagate its message: CCL could "fund [the ad] through a political action committee," "publish the advertisement [in] a medium other than 'broadcast, cable or satellite,'" or modify the ad so that it did not "clearly identify" Senator Snowe. *Id.* Second, the "Crossroads" ad "appears to be the functional equivalent to the sham issue advertisements identified in *McConnell*." Id. at 10a. In the court's view, the ad—"which characterizes Senator Snowe's past stance on the Marriage Protection Amendment as '[u]nfortunate[]'—is the sort of veiled attack that the Supreme Court has warned may improperly influence an election." *Id.* Therefore, the court concluded, permitting corporate funding of such ads under the "proposed 'grass roots lobbying exception' would seriously impair the government's compelling interest in protecting the integrity of the electoral process." *Id.*

The Court then turned to the remaining requirements for preliminary injunctive relief, concluding that none was satisfied. CCL had failed to establish irreparable injury, the court reasoned, because "it retains ready options for communicating its message" consistent with FECA. *Id.* at 11a. Among other things, the court observed, CCL could simply enroll the single individual financing the ad in a PAC "and

have him or her direct the donation through that committee rather than into [CCL's] general corporate funds." *Id.* The court also concluded that the grant of a preliminary injunction would substantially injure the Commission in its efforts to enforce federal law and therefore disserve the public interest. *Id.* at 12a, 13a.[2]

4. a. CCL initiated this interlocutory appeal on May 11, 2006, and the following day filed both a Jurisdictional Statement and a request that this Court review the decision below on a highly expedited schedule. Such expedition was necessary, CCL argued, because if the appeal were heard in the usual course, "the League will lose its opportunity to broadcast ads in the days leading up to the Senate's anticipated June 5, 2006 vote on the federal Marriage Protection Amendment." Asserting that "[t]he League only wants to run the ad until the vote and not thereafter," CCL contended that it would be irreparably injured if it could not obtain a final decision before that date. This Court denied the motion to expedite on May 15, 2006.

b. On May 22, 2006, pursuant to a district-court order issued in conjunction with the denial of preliminary injunctive relief, the parties jointly submitted a statement containing their respective positions on further administration of the case. Both the FEC and Intervenor-Defendants urged the court to "use the time now available to build a [full factual] record so that this case is ready for a final decision at the earliest feasible time." Joint Report Pursuant to Order of May 9, 2006, at 5. CCL, in contrast, sought a stay of the district court proceedings, asserting that because "CCL presently has no concrete plans to run ads" in the future,

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[2] The district court dismissed in a footnote CCL's request for "a preliminary injunction, unlimited time-wise, that would encompass 'any electioneering communications by [the League] that constitute grass-roots lobbying.'" J.S. App. 3a n.1. The court noted that because CCL had failed to identify the content of such future communications or to establish any necessity for relief in this regard, "its request for the broader preliminary injunction is unwarranted." *Id.*

"there is no longer any pressing need" for "resolution by this Court of the questions presented." *Id.* at 8.

The district court denied CCL's request for a stay and, following a status conference on June 5, 2006, ordered the parties to file another "plan for completion of discovery and dispositive motion briefing on the earliest practicable date." June 5 Order, at 1.[3] The FEC and Intervenor-Defendants again urged the court to press forward, proposing two alternative schedules that, in their view, "balance[d] the requirement for expedition with the need to develop an appropriate record": either six or nine weeks of discovery commencing on June 26, 2006, followed by summary judgment briefing on an expedited basis. Joint Report Pursuant to June 5 Order, at 2.[4] CCL again stated that because it "currently has no specific plans to run [any "grassroots lobbying"] ads between now and election day," *id.* at 2, "radical expedition is no longer warranted in this case," *id.* at 6.

c. Before the court acted on these proposals, it *sua sponte* issued an order expressing its view that "the Crossroads portion of the case . . . appears moot unless the 'capable of repetition yet evading review' exception applies." June 23 Order, at 1. "That exception may not apply," the court further suggested, "because the 'Crossroads' adver-

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[3] Two days earlier, on June 13, 2006, the FEC moved to dismiss the portion of the case that does not involve the "Crossroads" ad, *i.e.*, those claims based on CCL's purported intent to run hypothetical ads in the future on undefined issues and at an unspecified time. *See supra*, at n.2. The motion argued that because those claims were entirely speculative, they did not present a ripe controversy suitable for adjudication. Intervenor-Defendants filed a corresponding motion for judgment on the pleadings, noting that, although they agreed with the FEC's contentions, the court could resolve the motions at the same time it addressed the merits. The district court ordered full briefing on these motions in an order issued May 23, 2006, and heard argument on August 8, 2006.

[4] Intervenor-Defendants indicated a preference for the more expeditious alternative in order to address the district court's concern that the case might become moot if it were not resolved before October 1, 2006. Joint Report Pursuant to June 5 Order, at 6.

tisement portion of the case—particularly in this fact-centered, as-applied challenge—may not be 'capable of repetition.'" *Id.* The court therefore ordered CCL to "show cause . . . why the 'Crossroads' portion of the case should not be dismissed as moot." The court also directed the FEC and Intervenor-Defendants to file papers addressing the same issue. *Id.*

CCL responded by arguing that the "Crossroads" claim was not moot because it fell within the "capable of repetition, yet evading review" exception. In particular, CCL contended that the as-applied challenge to FECA based on "Crossroads" was "capable of repetition" because CCL intended in the future to run what it called "materially similar" ads. Pl.'s Resp. to June 23 Order, at 1. CCL could specify nothing about those hypothetical advertisements and acknowledged that it had no concrete plans to develop or broadcast them. Instead, CCL stated that by "materially similar" ads, it "means that the ads' text, placement and timing would put them in contravention of the electioneering communication prohibition, just as the text, placement, and timing of the Crossroads ad put it in contravention of the electioneering communication prohibition." Pl.'s Opp. to FEC Mot. to Dismiss, at 6-7.

In briefs addressing the district court's suggestion of mootness and at oral argument on August 8, 2006, the FEC indicated that it considered it a "difficult" and "close question" whether the "capable of repetition, yet evading review" exception applied to the "Crossroads" claims. FEC Resp. to June 23 Order, at 1; Tr. (8/8/06), at 11. Although Intervenor-Defendants argued in their brief that CCL had not made a sufficient showing that the controversy was "capable of repetition," they also stated at argument that, in their view, the exception might well apply if CCL alleged that it intended to run ads like "Crossroads" when Congress considered the issue of same-sex marriage in a future pre-election period. *Id.* at 17, 20. What plainly did not suffice, Intervenor-Defendants contended, was CCL's general allegation of an intent to run ads that are "materially similar" to

"Crossroads" only in the sense that they meet FECA's definition of an "electioneering communication": such allegations would support only the *facial* challenge that this Court already resolved in *McConnell*, and therefore could not establish that the *as-applied* challenge presented by "Crossroads" was "capable of repetition." *Id.* at 18-20. Accordingly, Intervenor-Defendants argued that CCL had apparently failed on the current record to carry its burden of demonstrating the applicability of the exception. They also indicated, however, that "it was not [their] objective here to simply keep [CCL] out of court," and therefore that they would not oppose limited discovery on the question of CCL's intent regarding the broadcast of future ads. Intervenor-Defendants' Resp. to June 23 Order, at 8 n.2; Tr. (8/8/06), at 20. The district court reserved decision.

ARGUMENT

I. THIS APPEAL IS MOOT BECAUSE THE PRELIMINARY INJUNCTION CCL SEEKS WOULD NO LONGER HAVE ANY EFFECT ON THE RIGHTS OR OBLIGATIONS OF THE PARTIES

CCL's request for preliminary injunctive relief no longer presents a live controversy. The proposed injunction concerned a specific communication and a specific time period: CCL sought an order permitting it to broadcast the "Crossroads" advertisement from May 14, 2006, when that advertisement became an "electioneering communication" under FECA, until June 5, 2006, when the Senate had scheduled a vote on the federal Marriage Protection Amendment. That time period has expired, and CCL has explicitly disavowed any plans to broadcast the "Crossroads" ad in the future. CCL informed this Court in its motion to expedite that "[t]he League only wants to run the ad until the vote occurs and not thereafter"; that without expedited review, the League will "forever" lose its opportunity to broadcast the ad; and that "there is no need to run the grassroots lobbying advertisement after" the Senate vote. The Senate in fact defeated the Marriage Protection Amendment on June 7, and no additional vote on that legis-

lation is currently contemplated. CCL has since informed the district court that it "presently has no concrete plans to run ads beyond what it began on May 10." Joint Report Pursuant to May 9 Order, at 8; Joint Report Pursuant to June 5 Order, at 2 (stating that CCL "currently has no specific plans to run [any 'grass-roots lobbying'] ads between now and election day (November 7) that would be considered electioneering communications under the Federal Election Campaign Act").

The alleged "harm" that CCL sought to avoid through preliminary injunctive relief—losing the opportunity to broadcast its "Crossroads" advertisement prior to the Senate vote—has thus irrevocably occurred. *See* Joint Report Pursuant to June 5 Order, at 7 (noting that "[b]ecause the FEC was not enjoined from enforcing the electioneering communication prohibition against the broadcast of [Crossroads], the opportunity for the exercise of the commensurate First Amendment rights of speech and petition were irreparably lost"). As CCL has itself acknowledged, because a preliminary injunction could not restore that opportunity, "there is no longer any pressing need" for interim relief. Joint Report Pursuant to May 9 Order, at 8. Accordingly, "[n]o order of this Court could affect the parties' rights with respect to the injunction [it is] called upon to review." *Honig* v. *Students of Cal. Sch. for the Blind*, 471 U.S. 148, 149 (1985) (per curiam). Because this Court's review of the decision below therefore cannot serve any useful purpose, the appeal is moot. *See, e.g.*, *Calderon* v. *Moore*, 518 U.S. 149, 150 (1996) (case must be dismissed as moot when the court "cannot grant 'any effectual relief whatever'") (quoting *Mills* v. *Green*, 159 U.S. 651, 653 (1895)); *see, e.g.*, *Hodges* v. *Schinkert Sports Assocs., Inc.*, 89 F.3d 310, 312 (6th Cir. 1996) ("An appeal from the denial of a motion for preliminary injunction is mooted when the requested time period for the injunction has passed."); *Thournir* v. *Buchanan*, 710 F.2d 1461, 1463 (10th Cir. 1983) ("where an act sought to be enjoined has occurred, an appeal of a district court order denying an injunction is moot").

The exception to mootness doctrine for disputes that are "capable of repetition, yet evading review" does not apply to the request for preliminary injunctive relief, which is the sole subject of this appeal. CCL's complaint remains pending in the district court, which did not lose jurisdiction by virtue of this appeal. 16 Fed. Prac. & P. Juris. 2d § 3921.2. The legal issues underlying this appeal therefore in no sense "evade review." CCL's "requests for declaratory relief and for a permanent injunction raise the same underlying legal questions that are being argued in this appeal." *Independence Party of Richmond County* v. *Graham*, 413 F.3d 252, 256 (2d Cir. 2005). In addition, the as-yet unresolved issue of the mootness of the entire case remains pending in the district court. When the district court issues a final judgment—whether based on the merits or on jurisdiction—CCL may challenge any adverse ruling in this Court. *See Graham*, 413 F.23d at 256 ("There is no reason to believe that the issues raised by the [plaintiff's] request for permanent relief cannot be fully litigated before that court. And, in due course, following the entry of final judgment in that court, they can be reviewed on appeal in this court.").

Application of the "capable of repetition" doctrine is "wholly inappropriate" in these circumstances, moreover, for two additional reasons. *Id.* at 257. First, application of that exception to a request for interim relief would undermine the general rule, embodied in 28 U.S.C. § 1292(a), that appellate tribunals review only "final judgments" of lower courts. *See generally Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467 & n. 8 (1978). "[T]he impetus behind the statutory exception to the final judgment rule that allows an immediate appeal of an order refusing a preliminary injunction is to prevent irreparable harm to a litigant who, otherwise, might triumph at trial but be left holding an empty bag." *CMM Cable Rep., Inc.* v. *Ocean Coast Props., Inc.*, 48 F.3d 618, 620 (1st Cir. 1995) (internal quotation marks omitted). As the Second Circuit has explained, however,

> [w]here the event giving rise to the necessity of preliminary injunctive relief has passed, the "harm-

> preventing function cannot be effectuated by the successful prosecution of an interlocutory appeal from the denial of interim injunctive relief." And, since the legal questions underlying the interlocutory appeal remain before the district court in the still-pending action, review by [an appellate] court would unnecessarily and inappropriately preempt the district court's resolution of the controversy before it. In such circumstances, application of the "capable of repetition yet evading review" exception to mootness would harm the principle of finality without securing any benefit to the administration of justice.

Graham, 413 F.3d at 256-257 (quoting *CCM Cable*, 48 F.3d at 621).

Second, consistent with BCRA's mandate that courts expedite constitutional challenges to the Act, § 403, Pub. L. No. 107-155, the district court has proceeded to hear argument on dispositive issues since this appeal was filed. *See supra*, at 9-10 & n.3. If this Court were nevertheless to entertain this appeal on a "capable of repetition" theory, the district court could easily reach a final decision on the merits before this Court resolved CCL's challenge to the denial of preliminary injunctive relief. Such a final district court decision would moot this appeal in any event, squandering this Court's time and resources. *See, e.g., American Postal Workers Union* v. *U.S. Postal Serv.*, 764 F.2d 858, 860 n.3 (D.C. Cir. 1985) (final judgment moots appeal from denial of preliminary injunction).

II. THE UNANIMOUS DECISION OF THE THREE-JUDGE COURT IS CORRECT AND SHOULD BE SUMMARILY AFFIRMED

If this Court concludes that this appeal remains live, it should summarily affirm the decision below. The district court did not abuse its discretion in denying the motion for a preliminary injunction. *See, e.g., Ashcroft* v. *American Civil Liberties Union*, 542 U.S. 656, 664 (2004) ("This Court, like other appellate courts, has always applied the abuse of dis-

cretion standard on the review of a preliminary injunction.") (internal quotation marks omitted).[5] Preliminary injunctive relief is appropriate only if the plaintiff can establish (1) that it has "a substantial likelihood of success on the merits"; (2) that it "would suffer irreparable injury if the injunction is not granted"; (3) that an "an injunction would not substantially injure other interested parties"; and (4) that "the public interest would be furthered by the injunction." J.S. 7a-8a (quoting *CityFed Fin. Corp.* v. *Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995)). As the district court correctly concluded, CCL has failed to satisfy any of these requirements.

A. CCL Has Failed to Establish That It Will Likely Prevail on the Merits

CCL invites the Court to decide the ultimate question of the constitutionality of applying BCRA to its proposed ad even though that issue was not decided by the district court when it denied the preliminary injunction. Rather, the district court, without having developed a full factual record, held only that CCL had not shown a likelihood of success on its ultimate constitutional claims. The only issue before this Court is whether, bearing in mind the preliminary posture of the case and the lack of full summary-judgment briefing on the merits, the three-judge court's ruling on that point reflected an abuse of discretion. CCL has not carried the burden of showing that the district court's reasoning with respect to likelihood of success, which followed closely from that of the majority of this Court in *McConnell*, reflected an abuse of discretion.

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[5] CL asserts that the abuse-of-discretion standard should not apply here because of the emergency nature of the issue whether it may run the ads before June 5 and the prospect that its rights will be irrevocably lost if the issue were decided against it. Those reasons for abandoning the abuse-of-discretion standard, even if they ever had any merit, obviously do not survive the expiration of the Senate's vote on June 7.

1. The Act's "Electioneering Communication" Provisions Further Compelling Governmental Interests by Prohibiting Corporate-Funded "Issue Ads" Broadcast with the Purpose and Effect of Influencing Federal Elections

This Court has long recognized the strong governmental interests supporting Congress's "careful legislative adjustment of the federal electoral laws, in a 'cautious advance, step by step,' to account for the particular legal and economic attributes of corporations and labor organizations." *McConnell*, 540 U.S. at 117 (quoting *FEC* v. *National Right to Work Committee*, 459 U.S. 197, 209 (1982)) (citations omitted). The "electioneering communication" provisions of BCRA, which this Court upheld against a facial challenge in *McConnell*, form a key component of that congressional effort, directly furthering the compelling goals of eliminating undue corporate influence on the federal electoral process and preventing evasion of FECA's expenditure limits.

BCRA represents the latest step in Congress's century-long experience in tailoring the federal campaign-finance laws to address the unique concerns posed by corporate-funded communications. Since 1907, federal law has prohibited corporations from making contributions to federal candidates, and Congress subsequently expanded that ban also to cover corporate expenditures. These prohibitions were codified at 2 U.S.C. § 441b(a) in the Federal Election Campaign Act of 1971 (FECA), 86 Stat. 3, and in the Federal Election Campaign Act Amendments of 1974, 88 Stat. 1263.

In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (*MCFL*), this Court construed the statutory prohibition on corporate or union expenditures "in connection with" a federal election, 2 U.S.C. § 441b(a), to encompass only "express advocacy"—direct exhortations to support or oppose a candidate, such as "vote for" or "vote against." The Court's rationale in *MCFL* was based on its earlier discussion in *Buckley* v. *Valeo*, 424 U.S. 1, 40-43 (1976), where, in order to avoid constitutionally impermissible vagueness, this Court construed a statutory restriction

on expenditures "relative to" a candidate to include "only explicit words of advocacy of the election or defeat of a candidate."

This interpretation allowed corporations and unions to circumvent § 441b by using general treasury funds to finance sham "issue ads," aired just before an election, that criticized or praised candidates without using the prohibited "magic words" of express advocacy. Increasingly throughout the late 1990's, "[c]orporations and unions spent hundreds of millions of dollars of their general funds to pay for these ads, and those expenditures, like soft-money donations to the political parties, were unregulated under FECA." *McConnell*, 540 U.S. at 127-128. The spenders claimed that such ads were intended only to address current issues—no matter how directly they implicitly promoted or attacked a candidate by name, and no matter how soon before the election they were broadcast to the candidate's electorate.

To remedy this widespread evasion of the nation's campaign laws, Congress enacted the "electioneering communications" provisions of BCRA. Those provisions supplemented the failed express-advocacy framework with a "bright line" definition of "electioneering communication[s]," which corporations and labor unions may not fund except through a separate segregated fund. Included within that definition are all communications that (i) are disseminated through broadcast, cable, or satellite, (ii) refer to a clearly identified candidate for federal office, (iii) are made within 30 days of a primary election or 60 days of a general election, and (iv) target the electorate of the identified candidate. 2 U.S.C. § 434(f)(3)(A).

The Court in *McConnell* upheld this measure as a constitutional way "to correct the flaws [Congress] found in the existing system." 540 U.S. at 194. The Court "easily answered" the question whether the government interests involved were compelling, noting that it had "repeatedly sustained legislation aimed at 'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little

or no correlation to the public's support for the corporation's political ideas.'" *Id.* at 205 (quoting *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990)); *McConnell*, 540 U.S. at 223-224 ("To say that Congress is without power to pass appropriate legislation to safeguard an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection." (internal quotation marks omitted)).

The Court also concluded that BCRA's regulation of ads falling within the "electioneering communication" definition directly furthered those interests. Heeding the "unmistakable lesson of the record" before it, the Court credited Congress's determination that the express advocacy requirement was fatally underinclusive and "functionally meaningless." *McConnell*, 540 U.S. at 193-194.

> Not only can advertisers easily evade the line [between express advocacy and so-called "issue ads"] by eschewing the use of magic words, but they would seldom choose to use such words even if permitted. And although the resulting advertisements do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election. *Buckley*'s express advocacy line, in short, has not aided the legislative effort to combat real or apparent corruption.

Id. Although ostensibly addressed to pending legislative matters, the Court reasoned, "so-called issue ads" are "intended to influence the voters' decisions [in the candidate elections] and have that effect." *Id.* at 206. The Court therefore concluded that Congress "has a compelling interest in regulating" such ads, which are the "the functional equivalent of express advocacy." *Id.* at 205-206.

2. Because the "Crosssroads" Ad Directly Implicates Those Compelling Interests, the Electioneering Communication Provisions Are Narrowly Tailored As Applied to That Ad

The "Crossroads" ad exemplifies the type of ad that prompted Congress to enact, and this Court to uphold, BCRA's electioneering communication provisions. As applied to that ad, those provisions are therefore narrowly tailored to further the compelling government interests identified in *McConnell*.

Underlying *McConnell* was the recognition that although many purported "issue ads" "do not urge the viewer to vote for or against a candidate in so many words, they are no less clearly intended to influence the election." 540 U.S. at 193. As an illustration, the Court explained that "Little difference exist[s] . . . between an ad that urged viewers to 'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 540 U.S. at 126-127. "Crossroads" is a real manifestation of that hypothetical ad: It condemns as "unfortunate" Senator Snowe's record on a particular issue—her failure to support a constitutional amendment banning same-sex marriage—and exhorts viewers to "call [Senator] Snowe . . . immediately" and tell her to change that position. J.S. at 4 n.3. It does not simply seek to affect Senator Snowe's future vote, but it also criticizes her past vote—and it broadcasts that criticism to her electorate during the period immediately preceding a federal election in which she is a candidate.

CCL argues that broadcast ads mentioning Senator Snowe could not have had any impact on voters' decisions because she was running unopposed in the Maine Republican primary. As the district court found, this is wrong for at least two reasons. First, such ads could have affected the size of the vote Senator Snowe received in the primary, which in turn could affect her fundraising and ultimate prospects in the general election. Second, advertising directed at Senator Snowe during the period before the primary would

have had a direct impact on voters' choices in the general election. As the district court noted, "the advertisement might have the effect of encouraging a new candidate to oppose Senator Snowe, reducing the number of votes cast for her in the primary, weakening her support in the general election, or otherwise undermining her efforts to gather such support, including by raising funds for her reelection." J.S. App. 10a.

Because regulating the "Crossroads" ad thus directly furthers the compelling interests supporting BCRA, the district court did not abuse its discretion in concluding, based on the limited record before it on the motion for a preliminary injunction, that CCL is unlikely to succeed on the merits of its as-applied challenge.

B. CCL Cannot Demonstrate That It Would Suffer Irreparable Harm Without Injunctive Relief

1. The "electioneering communications" regulations afford CCL ample means of disseminating its message

The district court properly exercised its discretion to deny preliminary relief because CCL could not show that the application of BCRA to the "Crossroads" ad would cause it any significant harm, much less irreparable injury—a necessary prerequisite to any grant of interim relief. As this Court made clear in *McConnell*, BCRA imposes no bar on CCL's ability to engage effectively in so-called grassroots lobbying. To the contrary, that legislation leaves open ample means of disseminating lobbying communications to concerned citizens, and this Court determined in *McConnell* that those avenues fully protect the First Amendment interests of corporations like CCL.

a. CCL could easily have funded "Crossroads" through a PAC

Most obviously, CCL could have broadcast its proposed advertisement, without any alteration at all, on any radio or television outlet, at any time, simply by using a PAC to fund

the ads. See 2 U.S.C. § 441b(b)(2), 441b(c)(1). Indeed, given the record here, the funding of the "Crossroads" ad through a PAC would have been particularly easy to accomplish. The Jurisdictional Statement asserts that "[o]ne long-time donor has committed to paying the entire $3,992 cost of the radio buy so that the ads may be run for four weeks as scheduled. Heath Decl. 16." J.S. at 8. This amount is within the individual contribution limit to a PAC. 2 U.S.C. § 441a(a)(1)(C) ($5,000 annual limit). Thus, this one donor could have made his contribution directly to a PAC established by CCL, which would then have had all of the funds required to pay for the broadcast of the "Crossroads" ad in compliance with FECA.

CCL's ability to fund its proposed advertisements through a PAC precludes the as-applied challenge it now asserts. This Court has repeatedly held that the opportunity to use a PAC for election-related activity fully safeguards corporate and union First Amendment rights. *See, e.g.*, *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652, 668-669 (1990) (upholding rule that corporations must fund express advocacy with PACs); *FEC* v. *Beaumont*, 539 U.S. 146, 163 (2003) (upholding rule that corporations must fund campaign contributions with PACs). As this Court explained in *McConnell*:

> The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members, and it lets the government regulate campaign activity through registration and disclosure, see [2 U.S.C.] §§ 432-434, without jeopardizing the associational rights of advocacy organizations' members.

540 U.S. at 204 (quoting *Beaumont*, 539 U.S. at 163). The Court found no constitutional infirmity in requiring corporations and unions to pay for such ads from their PACs. Indeed, precisely because of the PAC option, this Court in *McConnell* rejected as "simply wrong" characterizations of

BCRA as a "complete ban" on speech. *McConnell*, 540 U.S. at 204 (quoting *Beaumont*, 539 U.S. at 162).

The absence of irreparable injury here is particularly striking given CCL's representations in its complaint that it had no objection to limiting funding for the ads to dollars contributed by individuals and to complying with the reporting and disclosure obligations imposed by BCRA on PACs engaged in electioneering communications. Compl., ¶¶ 32, 60-62. CCL purported to object only to the requirement that it pay for the ads from a segregated fund that could not solicit contributions in excess of $5,000 and that could solicit only members. Id. ¶ 62. But in the circumstances of this case, where an individual came forward to fully fund the ads with a contribution of less than $5,000, these supposedly objectionable features of BCRA would not have limited its ability to run the ad and thus could not have harmed CCL.[6] In short, on the facts of this case, BCRA provided a mechanism for CCL to fund and run its proposed ad, subject only to requirements that even CCL did not contend were injurious to it; CCL simply chose not to avail itself of that option.

b. CCL could have disseminated its message consistent with FECA even if it insisted on drawing the necessary funds from its general treasury

Even though it chose not to channel the single donation for "Crossroads" into a PAC rather than its general treasury, CCL still retained other effective options for publishing

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[6] Under the rules relating to PACs, that individual would have to be a member of CCL or among its executive personnel. 11 C.F.R. § 114.7(a); 11 C.F.R. § 114.5(g). Although CCL has not indicated whether the individual who agreed to fund the broadcast of "Crossroads" was among its members or executive personnel, CCL has stated that the individual has donated to CCL "a number of times" over more than a five-year period. Heath Dep., Ex. A to FEC Opp. to Mot. for Prelim. Inj., at 68. In any event, CCL's Executive Director testified that even if that individual did not come forward, the necessary funds could have been secured from other sources. *Id.* at 69-70.

its views without violating BCRA's electioneering communication regulations.

First, as this Court noted in *McConnell*, CCL could have disseminated its message at any time, in any outlet, and with any funds, "by simply avoiding any specific reference to federal candidates." 540 U.S. at 206. CCL could have, for instance, informed the public about the Marriage Protection Amendment by broadcasting its "Crossroads" ad exactly as drafted with the exception of the specific reference to Senator Snowe. Second, CCL could have used its general treasury funds to disseminate its advertisements identifying a federal candidate at any time, including close to an election, by publishing those ads in non-broadcast media such as newspapers or billboards. This ability to disseminate its message through non-broadcast alternatives provided ample opportunity to reach a mass audience without triggering the electioneering communications requirements. Third, CCL could have broadcast ads that referred to Senator Snowe by name outside the statutory pre-election windows. Such ads would not have been electioneering communications under BCRA and thus could have been funded from CCL's general treasury funds even if outside business corporations had made contributions to it.

As the district court correctly concluded, the ready availability of these effective alternative means fatally undermined CCL's allegations of irreparable injury.

2. The record in this case casts significant doubt on CCL's basis for seeking a preliminary injunction

CCL's attempt to establish irreparable injury fails for another reason: the record strongly suggests that CCL planned to run the "Crossroads" ad precisely in order to trigger—and then to challenge—FECA's electioneering communication requirements. As explained above, *see supra*, at 4-5, discovery revealed that this case had its genesis in an email in which counsel sought a plaintiff for a test case challenging the application of BCRA to ads involving the Marriage Amendment, and that CCL immediately re-

sponded and filed suit within ten days despite having raised no funds for the ad, having done nothing to produce it or to arrange for its airing, and having no definite plans about when, where, or how often the ad might run.

In short, the record casts significant doubt on CCL's claim that the "electioneering communication" provisions threatened any genuine "grassroots lobbying" efforts. By all indications, CCL had no intention to engage in such communications before counsel, through Focus on the Family, offered its legal services in generating this as-applied test case. In these circumstances, the district court plainly did not err in concluding that CCL had failed to establish irreparable injury.

C. Granting CCL's Preliminary Injunction Would Substantially Injure Other Parties and Disserve the Public Interest

Setting aside a duly enacted Act of Congress—even for a short period of time—substantially injures both the government and the public, the beneficiary of that law. "[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers). That burden is particularly significant in this case, where the governmental interests the statute serves are compelling. As this Court has noted, "to say that Congress is without power to pass appropriate legislation to safeguard ... an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection." *McConnell*, 540 U.S. at 223-224 (quoting *Burroughs* v. *United States*, 290 U.S. 534, 545 (1934)). The exemption for "grassroots lobbying" that CCL's suit contemplates would directly undermine this compelling interest and effectively re-open the pre-BCRA loophole that allowed corporations and unions to fill the airwaves with electioneering ads funded from their general treasuries.

CCL's proposed injunction would also undermine Congress's compelling interest in clarity and consistency, one of

the key considerations motivating BCRA's "bright line" definition of electioneering communications. It was, after all, principally a concern for clarity that first led this Court to adopt the "express advocacy" test as a gloss on FECA's language. *Buckley*, 424 U.S. at 40-44, 79-80. After twenty-five years' experience, that test proved overly susceptible to manipulation and therefore incapable of serving its intended purpose. In crafting a remedy, Congress heeded this Court's admonitions concerning vagueness, and provided a new "bright line" test that was better tailored to capture campaign-related speech.

CCL's proposed relief would vitiate that interest by effectively creating a broad and ill-defined judge-made exemption for "grassroots lobbying," a potentially boundless category subject to exploitation by corporate and union spenders seeking the same kind of "as applied" relief from the statute based on assertions that their ads similarly intend to influence legislation rather than elections.

To accept this invitation is to undermine the heart of Title II—the clarity and certainty of the "bright line" test it provides. In the name of "grassroots lobbying," CCL proposes to reintroduce uncertainty into the statute, replacing BCRA's bright-line definition with *ad hoc* judicial determinations that carve out exceptions to the otherwise clear standards Congress provided. Both Congress and this Court have rejected this approach. Clarity and certainty are themselves a valuable public interest in laws that touch on speech, and the relief CCL seeks would disserve that interest.[7]

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[7] The decision of the three-judge court was also plainly correct to the extent it denied CCL's request for "a preliminary injunction, unlimited time-wise, that would encompass 'any electioneering communications by [the League] that constitute grass-roots lobbying.'" J.S. App. 3a n.1; *see supra*, at n.2. CCL could not possibly establish the required showings for emergency relief with respect to hypothetical advertisements of undefined content, particularly where CCL does not allege any present intent to broadcast such ads and offers no indication about the circumstances in

CONCLUSION

For the above reasons, this Court should dismiss this appeal as moot, or in the alternative, summarily affirm the decision of the three-judge court denying CCL's motion for a preliminary injunction.

Respectfully submitted,

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which they might appear. Accordingly, as the district court concluded, such a "broader preliminary injunction is unwarranted." J.S. App. 3a n.1.